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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO FUENTES VERDEJA, Defendant and Appellant.	G039534 (Super. Ct. No. 06NF0623) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed and remanded with directions.

Tamara Zivot, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

Francisco Fuentes Verdeja appeals from a judgment after a jury convicted him of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))[1] (count 1) and aggravated assault with a vehicle (§ 245, subd. (a)(1)) (count 2), and the trial court sentenced him to a total term of two years in state prison. Verdeja argues there were instructional errors, the prosecutor committed prejudicial misconduct, and there was cumulative error. He also contends we must modify the abstract of judgment to reflect the court's intent of imposing and staying the sentence on count 2. Finding no error, we affirm the judgment, but remand the matter for sentencing to allow the trial court to determine the appropriate term on the stayed sentence on count 2.

FACTS

On the evening of January 31, 2006, Jared Dewald parked his truck in an alleyway at an Anaheim shopping center and went inside a frozen yogurt shop. As he walked out of the shop, he noticed his truck's interior lights were on, and he saw the passenger side door close. Simultaneously, he saw a minivan parked behind and on the other side of his truck; its door slid close. Dewald estimated the minivan was approximately two feet from his truck. He made this observation from approximately 50 feet away. As he approached his truck, Dewald was approximately 10 feet from the minivan, when the minivan driver began to back out of his parking stall. Dewald positioned himself in front of the minivan as the driver was attempting to leave the parking lot, and he shouted for the driver to stop. The minivan stopped and then began moving again. As the minivan moved, Dewald moved with it. The minivan driver turned as if he were going to enter a parking stall, but then accelerated and drove toward Dewald. As the minivan drove past Dewald, the minivan struck him on the right leg.

[1] All further statutory references are to the Penal Code.

After the minivan drove away, Dewald called his father with the minivan's license plate number. When he returned to his truck, he saw his stereo had been taken. Verdeja was later identified as a suspect.

At trial, Lynnette Ruiz testified she was employed by the City of Anaheim Police Department and was a member of the forensics detail. Ruiz indicated she had been employed with the city for almost 15 years. Her training included attendance at a three-week FBI training course, a Sheriff's course at California State University Long Beach, on-the-job training, and continuing education. Ruiz also stated she participated in annual week-long courses that consisted of approximately 40 hours of training.

Ruiz explained that on February 1, 2006, she processed Dewald's truck for fingerprint evidence. She was able to lift latent prints from the driver's door. She identified the latent fingerprints as being made by Verdeja.

The defense called Anaheim Police Officer Michael Helmick. Helmick testified he presented a photo line-up to Dewald, and Dewald identified Verdeja. Helmick admitted he was a friend of the Dewald family for some time, and he had offered to help resolve this crime. The defense also called Anaheim Police Officer Jon Acuna. Acuna was the officer who responded to Dewald's burglary call the night of January 31, 2006. He testified that on the night of the incident, Dewald described the driver as a male Hispanic, 35 to 40 years old, 180 pounds, with short black hair and a goatee. Dewald indicated he could identify the driver if he saw him again. Verdeja's mother and friend both testified he had never worn a goatee and was 28 years of age in January 2006.

The defense requested an instruction on fingerprint evidence (the Special Instruction) that read as follows: "Fingerprint analysis is not a scientist offering exact conclusions but an expert giving an opinion." The trial court refused the instruction. The

court found the matter was adequately covered by the standard CALCRIM[2] instruction on expert testimony.

DISCUSSION

I. Special Instruction

Verdeja argues the trial court's erroneous refusal to give the Special Instruction violated his federal constitutional right to present a defense. We disagree.

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) However, the trial court may refuse special instructions requested by a defendant if they are duplicative of standard instructions or argumentative. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) A special instruction is not duplicative "only when the point of the instruction would not be readily apparent to the jury from the remaining instructions." (*Id.* at pp. 558-559.) And, a special instruction is argumentative if it highlights specific items of evidence, and a trial court may refuse argumentative instructions because they invite the jury to draw inferences favorable to one of the parties from the specified items of evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 361.)

The Special Instruction provided: "Fingerprint analysis is not a scientist offering exact conclusions but an expert giving an opinion." The trial court instructed the jury with CALCRIM No. 332, "Expert Witness Testimony," which stated: "A witness was allowed to testify as an expert[] and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the

[2] Judicial Council of California Criminal Jury Instructions (2007-2008).

reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

Verdeja claims the case "hinged on the weight to be accorded the fingerprint evidence[,]" and because the trial court refused to instruct the jury with the Special Instruction, "the jury was not given any direction in its evaluation of the fingerprint evidence[.]" Not so.

The Special Instruction was duplicative of CALCRIM No. 332, the general instruction concerning the evaluation of expert testimony, which properly instructed the jury on how to evaluate Ruiz's testimony. CALCRIM No. 332 informed the jury it could consider Ruiz's opinions, but it was not required to accept them as scientifically established truths. The instruction told the jury to consider Ruiz's professional qualifications, and the information she relied on in reaching her opinion. The instruction also instructed the jury it could completely disregard Ruiz's testimony if it found the testimony to be unbelievable, unreasonable, or without evidentiary support. Contrary to Verdeja's assertion, CALCRIM No. 332 instructed the jury Ruiz was offering an expert opinion on fingerprint evidence and it could reject her testimony if the jury found it to be without proper foundation. The Special Instruction did not provide any additional clarification on the issue of how to assess the believability of Ruiz's testimony. Further, CALCRIM No. 332 explained the basis upon which the jurors could evaluate Ruiz's testimony in language that was easily understood—it did not need clarification.

Additionally, the Special Instruction was argumentative. The Special Instruction stated, "fingerprint analysis is not a scientist offering exact conclusions[.]" This portion of the Special Instruction highlighted Ruiz's testimony and invited the jury to draw inferences favorable to Verdeja, which is improper. This portion of the Special

Instruction was not a neutral statement of the law and was better suited for defense counsel's closing argument. Indeed, Verdeja's defense counsel zealously argued fingerprint evidence is not an exact science that produces 100 percent accurate results. Counsel also attacked Ruiz's professional qualifications. The trial court's refusal to instruct the jury with the Special Instruction in no way prevented Verdeja from presenting a defense—attacking the reliability of the fingerprint evidence and Ruiz's credibility—and the court properly instructed the jury on how to evaluate that expert testimony with CALCRIM No. 332. The trial court properly refused to instruct the jury with the Special Instruction.

II. CALCRIM No. 220

Verdeja contends CALCRIM Nos. 220, "Reasonable Doubt," and 222, "Evidence," violated his federal constitutional right to due process because it "precluded [the jury] from considering the lack of other evidence corroborating the prosecutor's theory . . . ." He also complains CALCRIM No. 220 directed the jury to "compare the evidence presented in a manner evoking the civil standard of preponderance of the evidence." Finally, he claims the prosecutor committed misconduct and compounded the error during closing argument. With respect to his instructional claim, at least three appellate courts have rejected this same or similar argument.[3] As to his claim of prosecutorial misconduct, we will address that anon.

The trial court instructed the jury with CALCRIM No. 220, which stated: "The fact that a criminal charge has been filed against the defendant[] is not evidence that

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[3] The Attorney General argues Verdeja waived appellate review of this issue because he did not object to the instructions at trial. Because these instructions affect Verdeja's substantial rights, we may review the claim even though defense counsel did not object. (§ 1259.)

the charge is true. You must not be biased against the defendant[] just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

The court also instructed the jury with CALCRIM No. 222, which stated in relevant part, "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence."

In *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509 (*Westbrooks*), the Court of Appeal, Fourth Appellate District, Division One, stated:

"CALCRIM No. 220[] merely instructs the jury that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof. In other words, this instruction informs the jury that the People may not meet their burden of proof based on evidence other than that offered at trial. The instruction *does not* tell the jury that it may not consider any perceived lack of evidence in determining whether there is a reasonable doubt as to a defendant's guilt. Further, the remainder of the instructions clearly conveyed to the jury the notion that the People had the burden of proving

[defendant's] guilt beyond a reasonable doubt and that the jury was required to determine whether the People had met their burden of proving all of the facts essential to establishing his guilt."[4] (Italics added.)

In *People v. Flores* (2007) 153 Cal.App.4th 1088, 1093 (*Flores*), the Court of Appeal, Fifth Appellate District, addressed the identical issue. The court stated: "Here, the plain language of [CALCRIM No. 220] tells the jury that '[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.' [Citation.] . . . The only reasonable understanding of this language is that a lack of evidence could lead to reasonable doubt. [¶] Nothing about the instructions given implies to the jury that the defendant must adduce evidence that promotes reasonable doubt or that the defendant must persuade the jury of his or her innocence by evidence presented at trial. [Citation.]"

Finally, in *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268-1269 (*Guerrero*), the Court of Appeal, Third Appellate District, stated: "CALCRIM No. 220 does not suggest an impermissible definition of reasonable doubt to the jury. The instruction defines reasonable doubt as the absence of an abiding conviction in the truth of the charges. . . . [Citation.] The instruction neither lowers the prosecution's standard of proof nor raises the amount of doubt the jury must have in order to acquit a defendant. [¶] . . . CALCRIM No. 220 instructs the jury to acquit in the absence of evidence. . . . [Citation.] The jury is instructed to consider only the evidence, and to acquit unless the evidence proves defendant's guilt beyond a reasonable doubt. If the government presents no evidence, then proof beyond a reasonable doubt is lacking, and a reasonable juror applying this instruction would acquit the defendant."

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[4] In *Westbrooks*, the trial court also instructed the jury with the following instructions: CALCRIM No. 222, "Evidence," and CALCRIM No. 223, "Direct and Circumstantial Evidence: Defined." Here, the trial court instructed the jury with those instructions and CALCRIM No. 224, "Circumstantial Evidence: Sufficiency of Evidence."

Verdeja, acknowledging these cases, offers no compelling justification for concluding CALCRIM Nos. 220 and 222 are unconstitutional. We find the reasoning in *Westbrooks*, *Flores*, and *Guerrero* sound and conclude CALCRIM Nos. 220 and 222 properly define reasonable doubt and the evidence the jury may consider in making its determination whether the prosecutor satisfied its burden.

Finally, CALCRIM No. 220 informed the jury Verdeja was presumed to be innocent and, therefore, his reliance on *Coffin v. United States* (1895) 156 U.S. 432, 452-461, is misplaced. Therefore, the trial court properly instructed the jury with CALCRIM Nos. 220 and 222.

III. Prosecutorial Misconduct

Verdeja claims the prosecutor committed prejudicial misconduct during closing argument when he misstated the law concerning the proper burden of proof and improperly commented on his failure to testify. The Attorney General contends Verdeja waived appellate review of these contentions because his defense counsel failed to object and request an admonition. With respect to the waiver claim, Verdeja claims any objection would have been futile and would not have cured the misconduct.[5]

Because defense counsel did not object and request an admonition, Gomez waived appellate review of the issue. (*People v. Stanley* (2006) 39 Cal.4th 913, 959.) However, to forego the inevitable ineffective assistance of counsel claim, we will address the merits of his contentions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 92.)

During closing argument the prosecutor stated: "The other thing I have to prove to you is that there is no reasonable explanation that points to innocence. Because if you have a reasonable explanation that points to innocence, that's a reasonable doubt. Does that sort of make sense? So, there is in this case no reasonable explanation that

[5] Verdeja's suggestion the prosecutor's comments were so reprehensible that the trial court had a duty to stop the prosecutor's arguments is of no help in determining whether the prosecutor did in fact commit misconduct.

points to innocence. . . . [¶] . . . Now, it's my burden of proof but the bottom line is if . . . Verdeja is innocent, you have to answer the following questions. One, why did . . . Dewald identify him? He doesn't know . . . Verdeja from anyone else. Why would he pick him out? Two, why would . . . Dewald, if he intended to frame him for some particular reason why would he do that? He doesn't know . . . Verdeja. He has no chip on his shoulder, no ax to grind. Three, why would . . . Verdeja's prints show up on the truck. Four, if the comparison is erroneous, if . . . Ruiz screwed up somehow, she got it completely wrong, the whole process is wrong, why does it point to . . . Verdeja? And five, if she screwed up, where is the evidence that she screwed up? Where is any evidence to show she got it wrong? Because you have to answer these questions, there has to be a reasonable explanation if you're going to find . . . Verdeja not guilty. It's that simple, you have to answer those questions in your head." A little later the prosecutor argued, "And ultimately, what I am asking is that you ultimately find him guilty based on the evidence that you have before you . . . ."

During rebuttal argument, the prosecutor stated: "And if he is trying to suggest something about a car wash, what difference does it make when, okay? The fact of the matter is the prints are there the day after this happens. They're clear as day. They're pulled off and they're . . . Verdeja's prints. If you want to vote not guilty because perhaps they were put there, some stretch, two weeks beforehand, just coincidentally . . . Verdeja happened to touch . . . Dewald's truck sometime prior to January 31st, by all means, I can't stop you, but it's not a reasonable conclusion. That's ultimately what we're talking about here, what is a reasonable explanation of the evidence? Where is any explanation that . . . Verdeja had any opportunity to touch, to be near . . . Dewald's truck on any other day except January 31st. There is none. There is absolutely no connection whatsoever. You have heard nothing."

"'[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to

overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 829-830.) Additionally, "[p]ursuant to *Griffin* [*v. State of California* (1965) 380 U.S. 609, 615 (*Griffin*)], it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf. [Citations.] We also suggested . . . [citation] . . . it is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide. [Citation.] But although '"*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand,"' the prohibition '"does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses."' [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 371-372.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

With respect to his first claim, the prosecutor stated he had to prove to the jury "there [was] no reasonable explanation that points to innocence." The prosecutor repeated he had the burden of proving Verdeja guilty, and as part of that burden, he had to dispel the jury of any doubt concerning Dewald's identification and the fingerprint evidence. Contrary to Verdeja's claim, the prosecutor did not suggest Verdeja had the burden to prove his innocence. The prosecutor simply posed a series of questions concerning Dewald's identification of Verdeja and the fingerprint evidence in assessing whether the prosecutor met his burden of proving Verdeja guilty beyond a reasonable doubt. And as we explain above more fully, the trial court properly instructed the jury on

reasonable doubt and the presumption of innocence. Additionally, the trial court instructed the jury with CALCRIM No. 200, "Duties of Judge and Jury," which informed the jury that if anything counsel stated concerning the law conflicted with the instructions, the jury must follow the court's instructions.

As to his second claim, the prosecutor did not commit *Griffin* error by commenting on Verdeja's failure to testify. A prosecutor may comment on the state of the evidence, and a defendant's failure to introduce material evidence or call logical witnesses. Here, the prosecutor was simply commenting on the evidence the jury had before it, and defense counsel's failure to introduce evidence refuting the prosecutor's evidence. Verdeja claims the only evidence defense counsel could have offered to refute the fingerprint evidence was his testimony and, therefore, the prosecuted committed *Griffin* error. We disagree**.**

It was defense counsel who in closing argument first suggested an innocent explanation existed for Verdeja's fingerprints on the van, such as touching the truck in a parking lot. Verdeja was free to offer testimony to support his suggestion of an innocent explanation through third parties that could have established the relevant circumstances. In fact, he offered nothing but argument. By directing the jury's attention to the fact Verdeja never presented evidence there was another explanation for how his fingerprints were found on Dewald's truck, the prosecutor simply emphasized his failure to present material evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 554.) Thus, we conclude the prosecutor did not commit misconduct during closing argument because there was not a reasonable likelihood the jury understood or applied the complained of comments in an improper or erroneous manner.

IV. Cumulative Error

Verdeja contends the cumulative effect of the errors requires reversal. We have concluded there were no errors, and therefore, his claim has no merit.

V. Abstract of Judgment

Verdeja argues the abstract of judgment fails to include a sentence for count 2, and we should modify the abstract of judgment to reflect the trial court sentenced him to the low term of two years. The Attorney General states neither the court's oral pronouncement of judgment nor the abstract of judgment reflect the appropriate term, and we should remand the matter to the trial court for sentencing on count 2. We agree with the Attorney General.

When section 654 precludes sentencing a defendant for multiple convictions, the court should sentence the defendant for each count and stay execution of the sentence on the convictions to which section 654 is applicable. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420 [proper procedure for disposing of term banned by section 654 is imposing term and staying it].)

At the sentencing hearing, the trial court stated: "And on count 1, which is a two, three, five crime, the court will give you the benefit of having no prior criminal record, at least in this country, and select, therefore, the low term of two years. You're so sentenced. [¶] It seems to me that probably count 2 would [be stayed pursuant to section] 654. [¶] . . . [¶] And the court orders that sentence stayed pursuant to [section] 654."

"Entering a judgment of the trial court in the minutes is a clerical function. Any discrepancy between the minutes and the oral pronouncement of a sentence is presumed to be the result of clerical error. Thus, the oral pronouncement of sentence prevails in cases where it deviates from that recorded in the minutes. [Citation.]" (*People v. Price* (2004) 120 Cal.App.4th 224, 242.) Because the trial court did not orally pronounce judgment on count 2, we must remand the matter for sentencing on that count. We refuse Verdeja's invitation to impose a two-year sentence on that count because the trial court imposed the low-term sentence on count 1.

DISPOSITION

The judgment is affirmed. We remand the matter for sentencing to allow the trial court to determine the appropriate term on the stayed sentence on count 2.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.